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No. 03-464

Supreme Court, U.S.
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In The

Supreme Court of the United States

CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Petitioner Carson City has accurately listed the parties before the Ninth Circuit Court of Appeals. However, the law firm of Cooke & Story, Ltd. (the "firm") has an interest in the judgment at issue. The firm represented Respondent David Q. Webb before the district court and the appeals court. The firm has an attorneys' fee lien in the judgment at issue and has been awarded attorneys' fees by both the district court and appeals court. Webb does not have the financial wherewithal, legal training, nor grasp of the issues to represent himself before this Court. Accordingly, the firm files this Brief in Opposition. *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970) (Former attorney entitled to intervene as a matter of right because "[n]either of the existing parties is concerned with protecting the [attorney's] interest."); *Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989) (Former attorneys allowed to intervene to protect attorneys' interests.).

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Carson City arrested and incarcerated David Q. Webb ("Webb") on June 27, 1997, on the charges of obstructing a police officer, reckless driving, no valid driver's license, and no proof of insurance. The Carson City District Attorney's office (the "DA's office") dismissed the charges of reckless driving, no valid driver's license, and no proof of insurance on August 22, 1997. After a criminal trial on the merits on October 30, 1997, a Carson City municipal judge found Webb innocent of the charge of obstructing a police officer.

Webb filed a complaint in this case on November 26, 1997, in federal district court in Reno, Nevada. On August 24, 2001, after a four-day civil trial on the merits, the jury entered unanimous verdicts in favor of Webb and against Carson City on two civil rights claims – false imprisonment and malicious prosecution – and on three state law claims – false imprisonment, malicious prosecution, and abuse of process. The jury awarded Webb $80,000.00 in damages. The district court awarded attorneys' fees to the firm.

Carson City timely appealed the jury verdict to the appeals court. On May 29, 2003, the appeals court upheld the jury verdicts, and the appeals court awarded attorneys' fees to the firm.

Carson City failed to file its petition for writ of certiorari within the 90-day period of Supreme Court Rule 13.1. However, Carson City claims that it received an extension

of time from Justice O'Connor within which to file its petition for writ of certiorari.

STATEMENT OF THE FACTS

On June 27, 1997, Carson City Deputy Sheriff Darrin Sloan ("Deputy Sloan") pursued a speeding car in Carson City, Nevada. (Excerpt of Record "ER" 31-32.) The driver of the car pulled to a stop, exited the car, leapt a chain link fence, and fled. (ER 33-34.) Deputy Sloan described the driver of the car as a shirtless, black, 19-year-old man. (ER 35.) The car that this shirtless, black, 19-year-old man had been driving was identified almost immediately as belonging to one Freddy Little. (ER 35.) Five or so other deputy sheriffs set up a perimeter in approximately a one-half mile radius. (ER 34-35.) Within approximately 15 minutes, Carson City Deputy Sheriff Robert Guimont ("Deputy Guimont") discovered Webb behind a car within this perimeter. (ER 36 & 42.) Webb was carrying identification with his name on it; Webb was 32 years old (13 years older than the driver of the vehicle); and Webb was wearing a shirt. (ER 19.) The only trait the driver of the vehicle and Webb shared was they were both black men. (ER 37.)

Deputy Guimont handcuffed and arrested Webb on charges of obstructing a police officer, reckless driving, no valid driver's license, and no proof of insurance. (ER 38.) Deputy Guimont testified that Webb obeyed all of his commands. (ER 42.) He described Webb as "very cooperative" during his arrest. (ER 42.) Deputy Guimont further testified as follows:

Q. What, if anything, did Mr. Webb do to delay you that evening?

A. Other than us actually chasing him when we're supposed to be chasing someone else I can't think of anything else.

Q. Was he cooperative?

A. Yes, very cooperative.

Q. Was he polite?

A. Yes.

(ER 43.) Despite Webb's polite and cooperative behavior, Deputy Sloan and Deputy Guimont included the charge of obstructing a police officer because Webb had made the unfortunate mistake of being a black man in the vicinity and they had wasted their time chasing Webb rather than the suspect who had driven the vehicle.

On July 3, 1997, Deputy Sloan learned through another deputy sheriff and a confidential informant that Webb could not have been driving the speeding car he had chased on June 27, 1997. (ER 38-39.) Deputy Sloan acknowledged that this information he had learned through the confidential informant could only have come from the actual driver of the car. (ER 39.)

By July 7, 1997, Deputy Sloan had informed Carson City Deputy District Attorney Melanie Bruketta ("DDA Burketta") that Webb was not the driver of the car he had chased on June 27, 1997. (ER 40-41.) DDA Burketta recalled that Deputy Sloan had indeed spoken with her about Webb. (ER 44.) DDA Burketta further testified that she spoke with a Carson City municipal judge to secure Webb's release on the very day Deputy Sloan first had

spoken with her. (ER 44-46.) DDA Burketta further testified that this conversation with Deputy Sloan occurred the same day Webb was released from jail. (ER 44-46.) However, Carson City did not release Webb from jail until July 16, 1997. (ER 20-21.) DDA Burketta's testimony sharply differed from Deputy Sloan's, who testified that he spoke with DDA Burketta about Webb by July 7, 1997 – ten full days before Webb's release from jail. (ER 40-41.) DDA Burketta did not take any notes about her conversation with Deputy Sloan, as was her normal custom; and when pressured, she admitted that she could not remember the exact date she met with Deputy Sloan. (ER 44-48.)

DDA Burketta admitted that the Carson City DA's office has the power to determine who will be prosecuted. (ER 46.) She also stated the office policy for deputy district attorneys was as follows:

> Q. You had the authority at the time you had the conversation with Deputy Sloan to seek dismissal of this case, didn't you?
>
> A. Sure.
>
> * * *
>
> A. Yes, all deputies in the office could have dismissed the charges.

(ER 49.)

On August 15, 1997, Webb met with Carson City Deputy District Attorney Ray Oster ("DDA Oster") in the DA's office. (ER 22.) DDA Oster offered to dismiss the traffic charges – reckless driving, no valid driver's license, and no proof of insurance – if Webb would plead guilty to the charge of obstructing a police officer. (ER 24.) Webb refused the "deal." (ER 24)

After Webb refused DDA Oster's deal, it was time for the Chief Deputy District Attorney herself to intervene. (ER 25.) After all, three months or so had passed since Carson City knew it had arrested, imprisoned, and prosecuted the wrong man. The trial day was nearing. On September 3, 1997, Chief Deputy District Attorney Ann Langer ("CDDA Langer") tried a different approach: she told Webb that she would dismiss the charge of obstructing a police officer if he would agree to sign a waiver of civil liability. (ER 29.) Again, Webb declined. (ER 30.)

CDDA Langer tried yet another tactic. On approximately September 15, 1997, CDDA Langer threatened Webb publicly in front of four or five other persons. (ER 25-26.) CDDA Langer later told Webb's attorney that she was prosecuting Webb for obstructing a police officer because Webb refused to sign the waiver of civil liability. (ER 25-26.)

On October 30, 1997, CDDA Langer tried the case against Webb for obstructing a police officer. (ER 26.) A Carson City municipal judge found Webb innocent. (ER 27.)

Webb's arrest and lengthy incarceration caused him to lose his unemployment benefits, which in turn caused him to become homeless during the entire time these criminal charges were pending against him. (ER 27-28.)

REASONS FOR DENYING THE PETITION

Carson City argues that the appeals court misinterpreted or misunderstood the evidence and Nevada law and shifted the burden of proof to Carson City. According to

Carson City, the appeals court's opinion "will have profoundly negative consequences that extend far beyond" the State of Nevada. Pet. at 2. This is simply not the case, as the appeals court itself held.

Carson City ignores or misstates the evidence and jury findings, then applies this distorted picture of the appeals court's decision in an attempt to create error. Carson City's asserted errors amount to nothing more than a dispute about the evidence. Carson City concedes as much, stating, "[T]he Ninth Circuit misapprehended the evidence in the record." Pet. at 14.

Carson City also claims the appeals court misapplied the law, yet concedes the appeals court correctly stated its obligations under this Court's ruling in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). Pet. at 12, 14, and 15.

Supreme Court Rule 10 provides, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The appeals court's opinion is a correct interpretation of state and federal law and will not have the national consequences Carson City suggests. Carson City has presented no reason for this Court to grant its petition for writ of certiorari.

I. CARSON CITY'S GROUNDS FOR APPEAL CONSIST OF NOTHING MORE THAN ASSERTED ERRORS ABOUT FACTUAL FINDINGS.

Carson City's arguments for granting certiorari are intentionally confusing and internally inconsistent. A cursory review of Carson City's petition demonstrates that Carson City disputes the evidence adduced at trial. Carson

City attempts to cast its factual dispute as a legal argument by incorrectly asserting that the appeals court reached the "surprising conclusion" that it is municipal policy for its prosecutors "to effect baseless prosecutions." Pet. at 2. Carson City further claims there is no evidence that the district attorney ever delegated policymaking authority to deputy district attorneys. Carson City actually argues that the only evidence in the record demonstrates that deputy district attorneys were "constrained by the office policy of not prosecuting in the absence of probable cause." Pet. at 16. Carson City's arguments are without merit and are unworthy of this Court's consideration.

The jury, not the appeals court, unanimously found that Carson City had a custom, practice, and policy of prosecution without probable cause. On August 24, 2001, the jury reached the following unanimous verdict:

> We the jury in [sic] having been duly empanelled and sworn upon oaths do say that we have reached the following verdict:
>
> As to Defendant Carson City, number 1, did Plaintiff prove that Defendant Carson City has a custom, policy or practice that violated the Plaintiff's federal Constitutional right not to be prosecuted without probable cause?
>
> Answer: Yes.

(ER 50.) Substantial evidence supports this verdict.

As previously noted, three separate deputy district attorneys, including the chief deputy district attorney, each participated in the misdemeanor prosecution of Webb. Moreover, DDA Burketta testified that "all the

deputies in the office could have dismissed the charges against" Webb. (ER 49.) Webb acknowledges that DDA Burketta denied that the DA's office had a policy of prosecuting individuals without probable cause. However, this denial was not credible because it directly contradicted all other evidence adduced at trial. Deputy Sloan informed DDA Burketta by July 7, 1997, that Webb was not the driver of the car he had stopped. Indeed, Deputy Sloan even provided the DA's office with a report to this effect. Yet, DDA Burketta testified that she spoke with the Carson City municipal judge and secured Webb's release the same day that Deputy Sloan spoke with her. Webb was not released until July 16, 1997. Thus, DDA Burketta's testimony differed sharply from Deputy Sloan's. In addition, DDA Burketta, DDA Oster, and CDDA Langer each decided to proceed with the prosecution of Webb despite the arresting officer's clear statement to them that Webb was not the driver of the car he had chased.

The question whether a custom, policy or practice existed under 42 U.S.C. § 1983 is a jury question. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996). The evidence in this case demonstrates that three separate deputy district attorneys, including the chief deputy district attorney, on multiple occasions over months of time, independently elected to prosecute Webb without probable cause. Each separate deputy district attorney had authority to dismiss the case against Webb and in fact offered to do so if he would only release Carson City from liability. As this Court has held, "the word 'policy' generally implies a course of action consciously chosen among various alternatives. . . . " *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Each deputy district attorney consciously chose between alternatives – prosecute without probable

cause or dismiss the case against Webb – and these repeated, separate, and independent decisions occurred over a period of months of time. A clear custom, policy, or practice of prosecution without probable cause emerged. The jury lawfully and appropriately found that Carson City did indeed have a custom, policy, or practice of prosecution without probable cause. Accordingly, Carson City's arguments to this Court are nothing more than a dispute about the factual findings of the jury, which Carson City has inappropriately recast as error by the appeals court.

II. THE DISTRICT COURT AND THE APPEALS COURT PROPERLY HELD THAT UNDER NEVADA LAW DEPUTY DISTRICT ATTORNEYS HAVE FINAL POLICYMAKING AUTHORITY UNDER 42 U.S.C. § 1983.

Carson City correctly notes that in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), this Court "held that whether a particular official has final policymaking authority is a question to be decided by applying state law." Pet. at 12. Carson City then complains that the appeals court did just that – "relied on nothing more than a Nevada statute" to hold that deputy district attorneys' have policymaking authority in Nevada in the area of criminal prosecutions. Pet. at 13. Carson City then agrees that throughout the Nevada Revised Statues, the Nevada Legislature vested Nevada district attorneys with plenary control and authority over criminal prosecutions. Carson City also agrees that Nevada case law supports this proposition. Indeed, Carson City argues that Nevada district attorneys have final policymaking authority in the area of criminal prosecution.

Carson City argues that NRS 252.070(1) does not possibly mean what it says:

> All district attorneys are authorized to appoint deputies, *who may transact all official business to the offices to the same extent as their principals.*

(emphasis added.) Carson City argues that if this statute means what it says then a Nevada deputy district attorney would have all the power of the office, including the power to establish "policy about what hours the office is to remain open."[1]

Carson City's argument is without merit. Under NRS 252.070(1) and Nevada case law, Nevada deputy district attorneys have final policymaking authority because they are vested by state law with plenary control and authority over criminal prosecutions. Carson City notes that five other states in the appeals court have similar laws, suggesting that if other states have similar laws Carson City's position is somehow strengthened. Nevada and the other western states that Carson City has named each have sparsely populated rural areas with far-flung townships in which it is imperative that the district attorney and his or

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[1] NRS 252.050 establishes the office hours for Nevada district attorneys ("at least from 9 a.m. to 12 p.m. and 1 p.m. to 5 p.m. on all days except Saturdays, Sundays and non judicial days"), but does empower the Boards of County Commissioners "to extend the days and hours during which the office of the district attorney must be kept open for the transaction of public office." The fact that this statute exists (constraining power in this area) shows that the Nevada Legislature chose not to constrain policymaking authority over deputy district attorneys.

her deputies be vested with policymaking authority to serve the very purpose of the office they hold.

Carson City argues that if the Nevada legislature had intended deputy district attorneys to have final policymaking authority, even the district attorney himself or herself could not constrain that authority. Carson City is again wrong as a matter of Nevada law. In *Waymet v. Homes,* 912 P.2d 816 (Nev. 1996), the Nevada Supreme Court held that under Nevada law deputy district attorneys were at-will employees who could be terminated with or without cause and recognized with approval that district attorneys can and do exercise the authority to constrain the policymaking authority of deputy district attorneys. As the evidence in this case shows, the Carson City district attorney left policymaking authority to his deputy district attorneys – a decision Nevada law allows.

Carson City also argues that the appeals court mistook decisionmaking authority for policymaking authority. Pet. at 24. Again Carson City is wrong. The Nevada legislature expressly vested policymaking authority over criminal prosecutions in Nevada district attorneys – a position with which Carson City agrees. Through NRS 252.070(1), the Nevada legislature likewise vested policymaking authority in deputy district attorneys. Indeed, under NRS 252.070(1) the Nevada legislature expressly provided that Nevada deputy district attorneys are vested with the identical policymaking authority as Nevada district attorneys themselves.

The facts of this case demonstrate that all deputy district attorneys, including the chief deputy district attorney, possessed policymaking authority, not mere decisionmaking authority for Carson City in the area of

criminal prosecutions, and then exercised that policymaking authority. Each deputy district attorney possessed and exercised complete control over Webb's prosecution. In addition, Carson City was prosecuting Webb for a violation of Carson City Municipal Code 8.04.050, obstructing a police officer. (ER 25-27.) Despite the fact that the very arresting officer informed the DA's office that he had arrested the wrong person, each deputy district attorney independently chose to continue to prosecute Webb – not because Webb was guilty of anything, but because the DA's office wanted to protect Carson City from liability. Accordingly, the deputy district attorneys established for Carson City the parameters for prosecutions under Carson City Municipal Code 8.04.050 and demonstrated the lengths to which the DA's office would go to protect Carson City – the municipality – from civil liability. After all, Carson City correctly asserts that the deputy district attorneys themselves are absolutely immune from personal liability.

In a transparent attempt to divert this Court's attention, Carson City speculates that the appeals court's holding that will have a chilling effect on future prosecutions in Nevada. In *Edgar v. Wagner,* 699 P.2d 110, 112 (Nev. 1985), the Nevada Supreme Court flatly rejected such speculation, stating that "[w]e are persuaded that prosecutors will not be adversely affected in their discharge of public duties by the application of qualified immunity where the allegations suggest malicious prosecution." The appeals court's decision will only discourage malicious prosecutions.

Finally, this Court defers to the appeals courts in the interpretation and application of state law within their respective circuits. *McMillian v. Monroe County, Alabama,* 520 U.S. 781, 786 (1997). In this case, a respected Nevada

federal district judge, the Honorable Edward C. Reed, who has been practicing law in Nevada for 51 years,[2] concluded that under NRS 252.070(1) deputy district attorneys had final policymaking authority as a matter of law. The appeals court likewise reached the same conclusion. This Court should not disturb a decision that was independently made by judges with considerable experience interpreting Nevada law.

III. THE NINTH CIRCUIT DID NOT SHIFT THE BURDEN OF PROOF UNDER 42 U.S.C. § 1983.

Carson City argues that the appeals court somehow shifted the burden of proof from a civil rights plaintiff to a municipality to demonstrate that the municipality had not delegated final policymaking authority from a policymaking elected official to his or her deputy. A plain reading of the appeals court holding demonstrates no such burden shifting. The appeals court held that the evidence below demonstrated that the Carson City district attorney left policymaking authority to his deputy district attorneys as evidenced by the fact that three separate deputy district attorneys exercised final policymaking authority in Webb's continued incarceration and criminal prosecution. Carson City had argued to the appeals court that the case of *Cristie v. Iopa,* 176 F.3d 1231 (9th Cir. 1999), was authority for the proposition that Nevada deputy district attorneys did not have final policymaking authority. The appeals court held that *Cristie, supra,* was of no help to Carson City because it was "distinguishable in fundamental ways"

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[2] *See* 2003 Judicial Staff Directory, page 1277.

from the facts of this case. *Webb v. Sloan,* 330 F.3d 1158, 1165 (9th Cir. 2003). One of those fundamental ways was that "Carson City presented affirmative evidence that any deputy in the office could have made the decision to dismiss the charges against Plaintiff without consulting with any supervisor." *Webb,* 330 F.3d at 1166. The appeals court did nothing in this case to diminish the burden of a civil rights plaintiff to prove that a municipality either had a long-standing practice or policy or that the action at issue was taken by a final policymaker. Webb did indeed meet his burden of proof, and nothing in the appeals court decision constitutes a shifting of that burden.

CONCLUSION

This Court should deny Carson City's petition for writ of certiorari because Carson City's asserted errors merely consist of a dispute as to the evidence and an alleged misapplication of a correctly stated rule of law. In addition, Carson City's assertion that the appeals court's decision will have adverse national consequences is nothing more than meritless speculation, rejected by the appeals court.

October 28, 2003.

Respectfully submitted,

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